

1 SEDGWICK LLP
2 ANTHONY J. ANSCOMBE, State Bar No. 135883
3 *anthony.anscombe@sedgwicklaw.com*
4 ALEXANDER A. GUNEY, State Bar No. 308192
5 *alexander.guney@sedgwicklaw.com*
6 333 Bush Street 30th Floor
San Francisco, CA 94104-2834
Telephone: 415.781.7900
Fax: 877.547.2780

7 SEDGWICK LLP
8 KAREN WOODWARD, State Bar No. 205543
9 *karen.woodward@sedgwicklaw.com*
10 801 S. Figueroa Street, 19th Floor
Los Angeles, CA 90017-5556
Telephone: 213.426.6900
Fax: 877.547.6580

11 Attorneys for Defendant
12 JELLY BELLY CANDY COMPANY

13
14 **UNITED STATES DISTRICT COURT**

15 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

16 JESSICA GOMEZ, individually, and on
17 behalf of all others similarly situated,

18 Plaintiff,

19 v.

20 JELLY BELLY CANDY COMPANY
21 and DOES 1-25, Inclusive,

22 Defendants.

Case No. 17-cv-00575-CJC (FFMx)

[Assigned to Judge Cormac J. Carney –
Courtroom 9B]

**DEFENDANT JELLY BELLY
CANDY COMPANY'S NOTICE OF
MOTION AND MOTION
TO DISMISS PLAINTIFF'S
COMPLAINT OR, IN THE
ALTERNATIVE, MOTION
TO STRIKE**

Action Filed: February 22, 2017
Action Removed: March 24, 2017
Original Response Date: March 31, 2017
New Response Date: April 21, 2017

23
24
25
26
27
28 84506232v3

**DEFENDANT JELLY BELLY CANDY COMPANY'S MOTION TO DISMISS PLAINTIFF'S
COMPLAINT OR IN THE ALTERNATIVE MOTION TO STRIKE**

TO PLAINTIFF AND HER ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 12, 2017 at 1:30 p.m., or as soon thereafter as the matter may be heard in Courtroom 9B of the above-entitled Court, at 411 W. Fourth St., Santa Ana, CA 92701, Defendant Jelly Belly Candy Company (“JBCC” or “Defendant”) will and hereby does move for an order to dismiss the Complaint filed by Plaintiff Jessica Gomez (“Ms. Gomez” or “Plaintiff”) pursuant to Rules 8, 9(b), 12(b)(6), and 12(f) of the Federal Rules of Civil Procedure. This motion is made following the conference of counsel pursuant to L.R. 7-3, which took place on April 11, 2017.

Plaintiff’s Complaint should be dismissed for failure to state a claim under Rule 12(b)(6), because Plaintiff fails to allege facts showing that reasonable consumers would be misled by the challenged-labeling, or that the challenged-labeling is material to reasonable consumers. In the alternative, Plaintiff’s allegations regarding advertising by JBCC should be stricken under Rule 12(f) because they are immaterial and impertinent to the claims at issue, and fail to satisfy Rule 9(b)’s pleading standard. The Court should also strike Plaintiff’s allegations about injunctive relief, because Plaintiff faces no risk of being misled in the future.

This motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities in Support of the Motion, and exhibits thereto, as well as all other matters that may be judicially noticed or introduced at the hearing of this matter.

DATED: April 21, 2017 SEDGWICK LLP

By: /s/ Anthony Anscombe
 ANTHONY J. ANSCOMBE
 Attorneys for Defendant
 JELLY BELLY CANDY COMPANY

TABLE OF CONTENTS

		<u>Page</u>
1		
2		
3		
4	I. INTRODUCTION	1
5	II. PLAINTIFF’S COMPLAINT	1
6	A. Plaintiff’s Allegations	1
7	B. Sport Beans	2
8	C. What the Complaint Does Not Allege	4
9	III. RELEVANT PLEADING STANDARDS	4
10	A. Rule 12(b)(6)	4
11	B. Rule 9(b)	5
12	IV. ARGUMENT	6
13	A. Plaintiff’s Complaint Should Be Dismissed Pursuant to	
14	Rule 12(b)(6)	6
15	1. The Court May Dismiss a Complaint Where It Is Clear	
16	That Reasonable Consumers, Targeted by the	
17	Advertisement, Would Not Be Deceived	6
18	2. Reasonable Athletes Would Not Be Deceived About Sugar	
19	Content, or About the Nature of This Product	7
20	3. Plaintiff Fails to Allege that “Evaporated Cane Juice”	
21	Is Material to a Reasonable Consumer	9
22	4. Plaintiff’s Allegations of Regulatory Violations and	
23	FDA’s Interpretations Do Not State a Claim	10
24	B. Alternatively, Plaintiff’s Allegations Regarding the Challenged	
25	Advertising Should Be Stricken	12
26	1. Rule 12(f) Permits the Court to Strike Immaterial and	
27	Impertinent Material	12
28	2. The Complaint Fails to Meet the Specificity Requirements	
	of Rule 9(b)	12

1	3. Plaintiff Lacks Standing to Seek Injunctive Relief	13
2	V. CONCLUSION	14

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page

CASES

<i>Ashcroft v. Iqbal</i>	
556 U.S. 662 (2009)	4
<i>Bates v. United Parcel Serv., Inc.</i>	
511 F.3d 974 (9th Cir. 2007)	13
<i>Bell Atlantic Corp. v. Twombly</i>	
550 U.S. 544 (2007)	4, 5
<i>Bly-Magee v. California</i>	
236 F.3d 1014 (9th Cir. 2001)	5, 12
<i>Brockey v. Moore</i>	
107 Cal. App. 4th 86 (2003)	6
<i>Bruno v. Quten Research Inst., LLC</i>	
280 F.R.D. 524 (C.D. Cal. 2011)	9
<i>Christensen v. Harris County</i>	
529 U.S. 576 (2000)	12
<i>Colgan v. Leatherman Tool Group, Inc.</i>	
135 Cal. App. 4th 663 (2006)	6
<i>Cover v. Windsor Surry Co.</i>	
2016 WL 520991 (N.D. Cal. Feb. 10, 2016)	14
<i>Duran v. Hampton Creek</i>	
2016 WL 1191685 (N.D. Cal. Mar. 28, 2016)	14
<i>Ebner v. Fresh, Inc.</i>	
838 F.3d 958 (9th Cir. 2016)	6, 7, 10
<i>Engalla v. Permanente Medical Group, Inc.</i>	
15 Cal.4th 951 (1997)	10
<i>Gest v. Bradbury</i>	
443 F.3d 1177 (9th Cir. 2006)	13
<i>Hadley v. Kellogg Sales Co.</i>	
2017 WL 1065293 (N.D. Cal. Mar. 21, 2017)	7

84506232v3

1	<i>Hairston v. S. Beach Beverage Co.</i>	
2	2012 WL 1893818 (C.D. Cal. May 18, 2012)	8
3	<i>Hill v. Roll Int'l Corp.</i>	
4	195 Cal. App. 4th 1295 (2011).....	6
5	<i>In re iPhone 4s Consumer Litig.</i>	
6	637 F. App'x 414 (9th Cir. 2016).....	5
7	<i>In re Stac. Elecs. Sec. Litig.</i>	
8	89 F.3d 1399 (9th Cir. 1996).....	5
9	<i>In re Tobacco II Cases</i>	
10	46 Cal.4th 298 (2009).....	9
11	<i>In re Vioxx Class Cases</i>	
12	180 Cal. App. 4th 116 (2009).....	7
13	<i>In re: First Am. Home Buyers Prot. Corp. Class Action Litig.</i>	
14	313 F.R.D. 578 (S.D. Cal. 2016).....	14
15	<i>Kearns v. Ford Motor Company</i>	
16	567 F.3d 1120 (9th Cir. 2009).....	5
17	<i>Khasin v. R. C. Bigelow, Inc.</i>	
18	2016 WL 1213767 (N.D. Cal. Mar. 29, 2016).....	14
19	<i>Knieval v. ESPN</i>	
20	393 F.3d 1068 (9th Cir. 2005).....	3
21	<i>Kwikset Corp. v. Superior Court</i>	
22	51 Cal.4th 310 (2011).....	9
23	<i>Lavie v. Procter & Gamble Co.</i>	
24	105 Cal. App. 4th 496 (2003).....	6
25	<i>Luman v. Theismann</i>	
26	647 F. App'x 804 (9th Cir. 2016).....	13
27	<i>Makaeff v. Trump Univ., LLC</i>	
28	145 F. Supp. 3d 962 (S.D. Cal. 2015).....	14
	<i>McCrary v. Elations Co., LLC</i>	
	2013 U.S. Dist. LEXIS 173591 (C.D. Cal. Apr. 24, 2013).....	3
	<i>McKinniss v. Kellogg USA</i>	
	2007 U.S. Dist. LEXIS 96106 (C.D. Cal. Sept. 19, 2007).....	6, 7, 8, 9

84506232v3

-iv-

DEFENDANT JELLY BELLY CANDY COMPANY'S MOTION TO DISMISS PLAINTIFF'S
COMPLAINT OR IN THE ALTERNATIVE MOTION TO STRIKE

1	<i>McKinniss v. Sunny Delight Beverages Co.</i>	
2	2007 WL 4766525 (C.D. Cal. Sept. 4, 2007).....	8
3	<i>McMillan v. Lowe’s Home Centers, LLC</i>	
4	2016 WL 2346941 (E.D. Cal. May 4, 2016).....	14
5	<i>Morgan v. Wallaby Yogurt Company, Inc.</i>	
6	2013 WL 5514563 (N.D. Cal. Oct. 4, 2013).....	8
7	<i>Neubronner v. Milken</i>	
8	6 F.3d 666 (9th Cir. 1993).....	5
9	<i>Odom v. Microsoft Corp.</i>	
10	486 F.3d 541 (9th Cir. 2007).....	5
11	<i>Perez v. Nidek Co.</i>	
12	711 F.3d 1109 (9th Cir. 2013).....	10, 13
13	<i>Phillips v. Apple Inc.</i>	
14	2016 WL 1579693 (N.D. Cal. Apr. 19, 2016)	14
15	<i>POM Wonderful LLC v. Coca-Cola Co.</i>	
16	134 S. Ct. 2228 (2014)	11
17	<i>Pratt v. Whole Foods Market California, Inc.</i>	
18	2014 WL 1324288 (N.D. Cal. Mar. 31, 2014).....	10, 11
19	<i>Rahman v. Mott’s LLP</i>	
20	2014 WL 5282106 (N.D. Cal. Oct. 15, 2014).....	14
21	<i>RDF Media Ltd. v. Fox Broad. Co.</i>	
22	372 F. Supp. 2d 556 (C.D. Cal. 2005).....	12
23	<i>Sidney-Vinstein v. A.H. Robins Co.</i>	
24	697 F.2d 880 (9th Cir. 1983).....	12
25	<i>Strumlauf v. Starbucks Corp.</i>	
26	192 F. Supp. 3d 1025 (N.D. Cal. 2016)	13
27	<i>Sugawara v. Pepsico, Inc.</i>	
28	2009 WL 1439115 (E.D. Cal. May 21, 2009).....	7
	<i>Swartz v. KPMG LLP</i>	
	476 F.3d 756 (9th Cir. 2007).....	13
	<i>United States v. El-O-Pathic Pharmacy</i>	
	192 F.2d 62 (9th Cir. 1951).....	6

1	<i>Vess v. Ciba–Geigy Corp. USA</i>	
2	317 F.3d 1097 (9th Cir. 2003).....	5, 13
3	<i>Videtto v. Kellogg USA</i>	
4	2009 WL 1439086 (E.D. Cal. May 21, 2009).....	7
5	<i>Warbel v. PepsiCo, Inc.</i>	
6	2010 WL 2673860 (N.D. Cal. July 2, 2010).....	7
7	<i>Werdebaugh v. Blue Diamond Growers</i>	
8	2014 U.S. Dist. LEXIS 71575 (N.D. Cal. May 23, 2014)	9
9	<i>Yumul v. Smart Balance, Inc.</i>	
10	733 F. Supp. 2d 1117 (C.D. Cal. 2010).....	7

STATUTES

11	21 C.F.R. § 101.9.....	8
12	Fed. R. Civ. P. 8.....	7
13	Fed. R. Civ. P. 9(b)	5, 7, 12
14	FED. R. CIV. P. 12(b)(6)	1, 4, 6, 12
15	Fed. R. Civ. P. 12(f).....	1, 12
16	Fed. R. Civ. P. 12(g)	1

OTHER AUTHORITIES

19	5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure	
20	§ 1216 (3d ed. 2004).....	5
21	<i>Sugar</i> , <u>Merriam-Webster.com</u> (last accessed April 20, 2017)	4
22	U.S. Food and Drug Administration, “Ingredients Declared as Evaporated	
23	Cane Juice: Guidance for Industry,” (May 2016)	2

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Jessica Gomez predicates her action a reflexive assertion that the term “evaporated cane juice” (“ECJ”) in the list of ingredients of her Jelly Belly Sport Beans misled her, and caused her to buy a product she would not otherwise have purchased. This is nonsense. No reasonable consumer could have been deceived by Sport Beans’ labeling—Gomez could not have seen “evaporated cane juice” without also seeing the product’s sugar content on its Nutrition Facts panel. And she has pled no facts to suggest that athletes, who consume this product to sustain intense exercise, would want to avoid sugar rather than affirmatively seek it. Gomez has not come even remotely close to stating a plausible claim against Jelly Belly Candy Company (“JBCC”). Pursuant to Federal Rule of Civil Procedure 12(g), Defendant JBCC respectfully request this Court dismiss Plaintiff’s Complaint under Rule 12(b)(6) or, in the alternative, strike allegations under Rule 12(f) regarding Sport Beans’ advertising and plaintiff’s claim for injunctive relief.

II. PLAINTIFF’S COMPLAINT

A. Plaintiff’s Allegations

At some unidentified point in time, Ms. Gomez bought some Sport Beans made by the Jelly Belly Candy Company. Her CLRA letter does not identify Ms. Gomez by name, and neither it nor her Complaint state where, when or how many packs of Sport Beans she purchased. (*See* Complaint, Exhibit B.) The Complaint does not identify the size of package, flavor or the variety of Sport Beans she bought, and does not allege that she even consumed them. She claims that she bought the product because its list of ingredients showed “evaporated cane juice.” She does not explain why this mattered to her. She faults JBCC for not disclosing that ECJ was sugar, and suggests that she actually thought it was juice. (*See, e.g.,* Complaint, ¶¶ 1, 20.) She does not disclose when or how she learned that ECJ is sugar. She claims to have seen advertising for Sport Beans, but does not identify

84506232v3

1 its content, where she saw it, when, or why it mattered to her. Beyond a few
 2 conclusory factual assertions in the first paragraph of her Complaint, she makes all
 3 of her remaining allegations “on information and belief.” (Complaint, ¶2)
 4 Ms. Gomez appears to have lent her name to this formulaic Complaint, but has
 5 shared absolutely nothing to suggest that she actually made a real-life decision to
 6 buy this product.

7 Plaintiff makes a number of allegations derived from nonbinding guidance
 8 released by FDA in May, 2016, indicating that FDA does not currently interpret
 9 “evaporated cane juice” as the “common or usual name” of sweeteners derived from
 10 liquid extracts of sugar cane, and stating that this ingredient should be called
 11 “sugar.” (See, e.g., Complaint ¶¶ 16, 18, and Ex. B at p. 2.) This policy also
 12 provides:

13 This guidance represents the current thinking of the Food
 14 and Drug Administration...on this topic. It does not
 15 establish any rights for any person and is not binding on FDA
 or the public.¹

16 Ms. Gomez purports to bring claims for negligent misrepresentation, violation
 17 of the CLRA, violation of the UCL, and violation of the FAL. She seeks to
 18 represent a putative nationwide class of Sport Bean purchasers. She seeks damages,
 19 restitutionary disgorgement, and injunctive relief.

20 **B. Sport Beans**

21 Plaintiff alleges that JBCC markets Sport Beans as “quick energy for sports
 22 performance,” and that its packaging highlights its carbohydrate, electrolyte and
 23 vitamin content. (Complaint, ¶ 10.) She notes that the ingredient list discloses the
 24 presence of ECJ, but does not list any other “commonly known sugar.” *Id.*

25 _____
 26 ¹ U.S. Food and Drug Administration, “Ingredients Declared as Evaporated Cane Juice: Guidance
 27 for Industry,” p. 3 (May 2016) *available at*: [https://www.fda.gov/downloads/Food](https://www.fda.gov/downloads/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/UCM502679.pdf)
 28 [/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/UCM502679.pdf](https://www.fda.gov/downloads/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/UCM502679.pdf) (accessed on
 April 21, 2017)

1 She states that the label does not explain that ECJ is sugar, not juice. *Id.*
 2 She contends that JBCC uses the term to suggest that the product has “healthy
 3 characteristics,” and that a pack of Sport Beans costs \$5.00. (Complaint, ¶¶ 19, 21.)
 4 She also claims that by using the term ECJ that JBCC “is able to deceive customers,
 5 including Plaintiff, regarding the basic nature of the product and its contents.”
 6 (Complaint, “Introduction.”)

7 JBCC attaches hereto photographs of the packaging for two varieties of Sport
 8 Beans, regular and “extreme,” which are distinguished only by the presence of
 9 caffeine in the “extreme” variety.² The front label of these 1 oz. packages discloses
 10 that they are “energizing jelly beans,” that they provide “QUICK ENERGY for
 11 sports performance,” and feature “Carbs,” “Electrolytes,” and “Vitamins B & C.”

12 The reverse label provides instructions for use:

13 Energize with one pack 30 min. before activity. Use
 14 additional beans as needed during activity to sustain energy
 15 level. Replenish with one pack after activity. Always
 16 consume with water. Not recommended for children, teens
 or pregnant or nursing women.

17 Another section of the back label describes how the product supports sports
 18 performance, with statements like “Carbohydrates to fuel your body during intense
 19 activity” and “Electrolytes (sodium and potassium) vital for maintaining fluid
 20 balance.”

21 A list of ingredients appears at the bottom of the back panel, showing the first
 22 three ingredients as: “Evaporated cane juice, tapioca syrup, cherry juice from
 23 concentrate.” Also on the back panel, in close proximity to the ingredients, appears
 24

25 ² JBCC requests this Court take judicial notice of labels from Sport Beans, as they appeared during
 26 the relevant timeframe, attached hereto as Exhibit A. *McCrary v. Elations Co., LLC*, No. 13-cv-
 27 0242 JGB, 2013 U.S. Dist. LEXIS 173591, at *6-*7 (C.D. Cal. Apr. 24, 2013) (“The Court can
 28 consider the labels under the incorporation by reference doctrine because Plaintiff relied on the
 labels in the FAC and does not challenge their authenticity.”) (citing *Knievel v. ESPN*, 393 F.3d
 1068, 1076 (9th Cir. 2005)).

1 a prominent “Nutrition Facts” statement. It informs consumers that the 100 calorie
2 pack has a “Total Carb” content of 25g, including “**Sugars 17g.**” (emphasis added.)

3 **C. What the Complaint Does Not Allege**

4 Plaintiff does not claim that she expected a sugar-free product, or that the
5 Sport Beans did not fuel her workout. She does not contend that sugar is not a
6 carbohydrate. (It is.³) Plaintiff does not purport to have read any portion of Title 21
7 of the Code of Federal Regulations. She does not profess any knowledge of how it
8 defines “juice” or “sugar.”

9 Gomez does not allege that she is an athlete, and makes no allegations as to
10 what an athlete would want or expect in a sports energy product. She does not
11 allege that an athlete would not know that sugar comes from “cane,” or that an
12 athlete would fail to recognize “evaporated cane juice” as a sweetener. She does not
13 explain why the presence or absence of “juice” would matter to an athlete. She does
14 not acknowledge that the very next ingredient on the label contained the word
15 “syrup.” She does not explain why sugar would be unhealthy, or undesirable, in a
16 product used to support intense exercise. Plaintiff also does not explain why an
17 athlete—or anyone—would be surprised to find sugar in a product described as
18 “Jelly Beans.”

19 **III. RELEVANT PLEADING STANDARDS**

20 **A. Rule 12(b)(6)**

21 A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6)
22 tests the legal sufficiency of the claims asserted in a complaint. FED. R. CIV. P.
23 12(b)(6). In order to survive a Rule 12(b)(6) motion, a complaint must contain
24 _____

25 ³ Merriam-Webster defines “sugar” as “a sweet crystallizable material that consists wholly or
26 essentially of sucrose, is colorless or white when pure tending to brown when less refined, is
27 obtained commercially from sugarcane or sugar beet and less extensively from sorghum, maples,
28 and palms, *and is important as a source of dietary carbohydrate* and as a sweetener and
preservative of other foods.” *Sugar*, Merriam-Webster.com (last accessed April 20, 2017)
(emphasis added).

1 sufficient factual matter, accepted as true, to “state a claim to relief that is plausible
 2 on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic*
 3 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “Factual allegations must be enough
 4 to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555
 5 (citing 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure
 6 § 1216 (3d ed. 2004) (stating that the pleading must contain something more than
 7 “a statement of facts that merely creates a suspicion [of] a legally cognizable right of
 8 action.”)). Although a court must accept as true all allegations of material fact,
 9 “[c]onclusory allegations of law and unwarranted inferences are insufficient to
 10 defeat a motion to dismiss for failure to state a claim.” *In re Stac. Elecs. Sec. Litig.*,
 11 89 F.3d 1399, 1403 (9th Cir. 1996) (citations omitted).

12 **B. Rule 9(b)**

13 Additionally, where claims allege a “unified course of fraudulent conduct and
 14 rely entirely on that course of conduct as the basis of that claim, ...the claim is said
 15 to be ‘grounded in fraud’ or to ‘sound in fraud,’ and the pleading...as a whole must
 16 satisfy the particularity requirement of Rule 9(b).” *Kearns v. Ford Motor Company*,
 17 567 F.3d 1120, 1125-26 (9th Cir. 2009). Rule 9(b) serves to give notice to the
 18 defendant of the specific fraudulent conduct against which it must defend.
 19 *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001). Rule 9(b) requires
 20 that a plaintiff state with particularity the circumstances constituting fraud, including
 21 “the time, place and specific content of the false representations....” *Odom v.*
 22 *Microsoft Corp.*, 486 F.3d 541, 553 (9th Cir. 2007). A plaintiff alleging fraud “must
 23 set forth *more* than the neutral facts necessary to identify the transaction. The
 24 plaintiff must set forth what is false or misleading about a statement, and why it is
 25 false.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003); *see*
 26 *also In re iPhone 4s Consumer Litig.*, 637 F. App’x 414, 415 (9th Cir. 2016);
 27 *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993) (“[A] plaintiff who makes
 28 allegations on information and belief must state the factual basis for the belief.”).

84506232v3

1 **IV. ARGUMENT**

2 **A. Plaintiff's Complaint Should Be Dismissed Pursuant to**
 3 **Rule 12(b)(6)**

4 **1. The Court May Dismiss a Complaint Where It Is Clear That**
 5 **Reasonable Consumers, Targeted by the Advertisement,**
 6 **Would Not Be Deceived**

7 To state a claim under the fraud-based theories set forth in the Complaint,
 8 Plaintiff must plausibly allege that the advertising is likely to deceive a reasonable
 9 consumer. *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016); *Hill v. Roll Int'l*
 10 *Corp.*, 195 Cal. App. 4th 1295, 1304 (2011) (finding the “reasonable consumer”
 11 standard controls false advertising claims brought under UCL, FAL, and CLRA);
 12 *McKinniss v. Kellogg USA*, No. 07-cv-2611 ABC, 2007 U.S. Dist. LEXIS 96106,
 13 *14-15 (C.D. Cal. Sept. 19, 2007) (applying reasonable consumer standard to claim
 14 for negligent misrepresentation).⁴ The primary evidence in a case alleging a
 15 misleading statement on product packing is the packaging itself. *Colgan v.*
 16 *Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 679 (2006) (quoting
 17 *Brockey v. Moore*, 107 Cal. App. 4th 86, 100 (2003)).

18 “Likely to deceive” requires more than a mere possibility; a plaintiff must
 19 establish a probability “that a significant portion of the general consuming public or
 20 *of targeted consumers*, acting reasonably under the circumstances, could be misled.”
 21 *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003) (emphasis
 22 added). The relevant population for determining the probability of deception is not
 23 the “least sophisticated consumer” nor an “unwary consumer,” but rather, “[t]he law
 24

25 ⁴ In paragraph 14 of the complaint, Plaintiff cites to an inapposite case for the proposition that a
 26 “misleading” statement “is judged in reference to ‘the ignorant, the unthinking, the credulous,
 27 who when making a purchase, do not stop to analyze.’” *United States v. El-O-Pathic Pharmacy*,
 28 192 F.2d 62, 75 (9th Cir. 1951). *El-O-Pathic Pharmacy* does not apply in the instant case,
 because it dealt with the labeling of prescription drugs under the Federal Food, Drug, and
 Cosmetic Act of 1938, and not California consumer protection laws.

1 focuses on a reasonable consumer *who is a member of the target population.*”
 2 *Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 1117, 1125 (C.D. Cal. 2010) (quoting
 3 *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 130 (2009)) (emphasis added);
 4 *see also, e.g., Ebner v. Fresh, Inc.*, 838 F.3d at 967 (holding that, in the market for
 5 high-end cosmetics, consumers would not find lip balm packaging deceptive, even
 6 though 25% of the product could not be used).

7 “[W]here a court can conclude as a matter of law that members of the public
 8 are not likely to be deceived by the product packaging, dismissal is appropriate.”
 9 *Warbel v. Pepsico, Inc.*, No. 09-cv-04456 SBA, 2010 WL 2673860, at *3 (N.D. Cal.
 10 July 2, 2010).⁵

11 **2. Reasonable Athletes Would Not Be Deceived About Sugar** 12 **Content, or About the Nature of This Product**

13 Here, the target population for Sport Beans is athletes who want
 14 carbohydrates and electrolytes to fuel their workout. Plaintiff’s Complaint rests on
 15 the irrational and unfounded premise that reasonable athletes (a population as to
 16 which Ms. Gomez betrays no evident familiarity) believe Sport Beans do not
 17 contain sugar, and are duped into misunderstanding the nature of this product
 18 because “evaporated cane juice” appears in the list of ingredients. This is simply
 19 not plausible.⁶

20 _____
 21 ⁵ *See also Sugawara v. Pepsico, Inc.*, No. 08-cv-01335 MCE, 2009 WL 1439115, at *3-*4
 22 (E.D. Cal. May 21, 2009) (finding that the packaging for Cap’n Crunch cereal and its use [of] the
 23 term “Crunch Berries” was not misleading); *Videtto v. Kellogg USA*, No. 08-cv-01324 MCE, 2009
 24 WL 1439086, at *2 (E.D. Cal. May 21, 2009) (dismissing UCL, FAL and CLRA claims based on
 25 allegations that consumers were misled into believing that “Froot Loops” cereal contained “real,
 26 nutritious fruit”); *McKinniss v. Kellogg USA*, No. 07-cv-2611 ABC, 2007 U.S. Dist. LEXIS
 27 96109, at *13 (C.D. Cal. Sept. 19, 2007) (same).

28 ⁶ Plaintiff’s Complaint does not meet the basic pleading standards of Rule 8. Much less does it
 meet the specific pleading requirements of Rule 9(b). *See, e.g., Hadley v. Kellogg Sales Co.*,
 No. 16-cv-04955 LHK, 2017 WL 1065293, at *15 (N.D. Cal. Mar. 21, 2017) (dismissing UCL,
 FAL, and CLRA claims pursuant to Rule 9(b), because “‘Plaintiff[] must connect the dots
 showing how the alleged misbranding misled plaintiffs in a way that a reasonable consumer would
 be deceived.’ Thus, Plaintiff must do more than simply state that the claim at issue violated

1 First, the Sport Beans’ packaging clearly and conspicuously discloses the
 2 product’s sugar content. The Nutrition Facts panel, in close proximity to the
 3 ingredient list, plainly displays the product’s total sugar content. Indeed, someone
 4 who reads from top to bottom, as most people usually do, will see the sugar content
 5 before they ever reach the list of ingredients. And it passes credulity that anyone
 6 who apparently cares so very much to avoid sugar would read the list of ingredients
 7 but ignore the Nutrition Facts panel. *Morgan v. Wallaby Yogurt Company, Inc.*,
 8 No. 13-cv-00296 WHO, 2013 WL 5514563, at *8 (N.D. Cal. Oct. 4, 2013)
 9 (explaining that plaintiffs’ claims that they would not have purchased the products
 10 had they known they contained sugar or dried cane syrup “is contradicted by the fact
 11 that the plaintiff nonetheless purchased the products despite the fact that the sugar
 12 content is listed right next to the ingredient list”). The FDA has required the
 13 Nutrition Facts panel since the early 1990s, *see* 21 C.F.R. § 101.9, and reasonable
 14 consumers, in reviewing the back panel, surely do not ignore this FDA-required
 15 information. *McKinniss v. Sunny Delight Beverages Co.*, 07-cv-02034 RGK, 2007
 16 WL 4766525, at *4 (C.D. Cal. Sept. 4, 2007) (“Nutritional labels have long been
 17 required on food products and are familiar to almost every reasonable consumer.”);
 18 *McKinniss v. Kellogg USA*, 2007 U.S. Dist. LEXIS 96106, at *13 (“Plaintiffs cannot
 19 claim surprise over these labels, which have long been required on food products
 20 and are familiar to a reasonable consumer.”).

21 That Ms. Gomez was assiduously selective in what she looked at is not the
 22 behavior expected of a reasonable consumer. *Hairston v. S. Beach Beverage Co.*,
 23 No. 12-cv-1429 JFW, 2012 WL 1893818, at *4 (C.D. Cal. May 18, 2012)
 24 (“The Court concludes that Plaintiff’s selective interpretation of individual words or
 25 phrases from a product’s labeling cannot support a CLRA, FAL, or UCL claim.”).

26
 27
 28 [federal law].”).

84506232v3

Beyond this obvious, fatal flaw in her pleading, Plaintiff has also pled no facts to support her conclusory assertion that the term ECJ misled consumers “about the nature of this product.” Sport Beans’ packaging and instructions make very clear that it is a product intended to provide energy to athletes while they workout. JBCC never represented it to be sugar-free and was clearly selling jelly beans, not “juice.” Sugar is a simple carbohydrate, and a source of quick energy. Plaintiff has pointed to no inconsistency between ECJ and sugar as an ingredient, or the athletic purpose for which this was marketed. No reasonable consumer, looking at this package, could have had any misunderstanding as to what this product was about.

3. Plaintiff Fails to Allege that “Evaporated Cane Juice” Is Material to a Reasonable Consumer

California courts recognize “that an injury exists under the UCL, FAL, and CLRA where a consumer has purchased a product that is marketed with a material misrepresentation, that is, in a manner such that ‘members of the public are likely to be deceived.’” *Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524, 535 (C.D. Cal. 2011) (quoting *In re Tobacco II Cases*, 46 Cal.4th 298, 312 (2009)). “A plaintiff can establish that a misrepresentation is material and thus violative of the consumer protection laws at issue ... by showing that ‘a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.’” *Werdebaugh v. Blue Diamond Growers*, No. 12-cv-2724 LHK, 2014 U.S. Dist. LEXIS 71575, at *44-45 (N.D. Cal. May 23, 2014); *see also McKinniss v. Kellogg USA*, 2007 U.S. Dist. LEXIS 96106, at *14 (dismissing a negligent misrepresentation claim under the reasonable consumer standard). “A misrepresentation is judged to be ‘material’ if ‘a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction.’” *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 332 (2011) (citations omitted). Where the “fact misrepresented is so obviously unimportant to that the jury could not reasonably find that a reasonable man would have been

84506232v3

1 influenced by it,” a court may find that such allegations insufficient as a matter of
2 law. *Engalla v. Permanente Medical Group, Inc.*, 15 Cal.4th 951, 977 (1997).

3 Here, even if this Court were to credit Ms. Gomez’s incredible assertion that
4 she bought this product *because* it contained ECJ, she has alleged no facts to show
5 why a reasonable athlete would attach any importance to the term “evaporated cane
6 juice,” or to the absence of the word “sugar” in the ingredient list. With respect to
7 the target population, Plaintiff has said absolutely nothing to establish the
8 materiality of the allegedly deceptive term. Why would an athlete, looking for
9 calories, want to avoid sugar? Why would an athlete, believing that she was buying
10 jelly beans, expect juice? The Complaint provides no answer.

11 **4. Plaintiff’s Allegations of Regulatory Violations and FDA’s** 12 **Interpretations Do Not State a Claim**

13 Plaintiff’s allegations regarding deceptiveness rest in large part on her
14 argument that FDA regards the term ECJ as violative of its regulations, and that
15 products listing ECJ are misbranded. (Complaint, ¶¶ 13-19.) These allegations do
16 not state a claim.

17 As an initial matter, not every alleged regulatory violation, *ipso facto*, serves
18 as the basis for a claim under California’s consumer protection laws. *Perez v. Nidek*
19 *Co.*, 711 F.3d 1109, 1119-20 (9th Cir. 2013) (rejecting “the proposition that any
20 violation of the FDCA will support a state-law claim”) (internal quotations and
21 citations omitted); *Pratt v. Whole Foods Market California, Inc.*, No. 12-cv-05652
22 EJD, 2014 WL 1324288, at *8 (N.D. Cal. Mar. 31, 2014) (“Plaintiff cannot
23 circumvent the reliance requirement by simply pointing to a regulation or code
24 provision that was violated by the alleged label misrepresentation, summarily
25 claiming that the product is illegal to sell and therefore negating the need to plead
26 reliance.”) Rather, a Plaintiff must plead facts showing that the allegedly unlawful
27 conduct would be material to consumers and cause actual deception. *See, e.g.*,
28 *Ebner v. Fresh, Inc.*, 838 F.3d at 967-968 (holding alleged violations of California’s

84506232v3

1 Sherman Act and Fair Packaging and Labeling Act did not support a claim that
2 packaging was deceptive, because reasonable consumers for high-end lip balm
3 product would understand that some portion of the product in the tube could not be
4 used); *Pratt v. Whole Foods Mkt. Cal., Inc.*, No. 12-cv-05652 EJD, 2014 U.S. Dist.
5 LEXIS 46409, at *26 (N.D. Cal. Mar. 31, 2014) (“[U]nder the ‘unlawful’ prong of
6 the UCL, a plaintiff must plead reliance when claims are premised on allegedly
7 deceptive advertising.”). For all of the reasons stated above, Ms. Gomez has not
8 pled facts to show that the Sport Beans’ label, even if contrary to a nonbinding FDA
9 recommendation, would deceive the relevant population of consumers.

10 Moreover, that FDA might, as a policy matter, construe its regulations to
11 prohibit the term “ECJ” does not mean that the term, as used here, deceived or
12 harmed anyone. Plaintiff is not the FDA, and has pled no familiarity with its
13 regulations, its definitions, and she does not purport to have read its policy statement
14 entitled “Ingredients Declared as Evaporated Cane Juice: Guidance for Industry,”
15 (May 2016). Plaintiff cannot claim that FDA’s regulations or interpretations colored
16 her own expectations of Sport Beans.

17 And there is an even more fundamental problem with Ms. Gomez’s reliance
18 on FDA’s interpretations: FDA does not have special expertise in understanding
19 consumer behavior, and its nonbinding guidance for industry does not merit special
20 deference. The U.S Supreme Court has recently noted that FDA’s focus is public
21 health and safety, in contrast to the protection of economic interests from unfair
22 competition. *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2237-40
23 (2014) (explaining that label images authorized by FDA regulations do not preclude
24 Lanham litigation, as competitors will have a more accurate understanding of
25 consumer behavior and deception than FDA, such that compliance with FDA
26 regulations does not establish a lack of consumer deception). The Court has further
27 held that agency policy statements, enforcement guidelines and similar agency
28

1 pronouncements, do not merit more deference than their underlying logic warrants.
 2 *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

3 Simply put, that FDA has suggested in nonbinding guidance that some
 4 consumers, under some circumstances, might not understand what ECJ is, does not
 5 mean that reasonable members of the target population for this product were likely
 6 to be misled.

7 **B. Alternatively, Plaintiff's Allegations Regarding the Challenged**
 8 **Advertising Should Be Stricken**

9 **1. Rule 12(f) Permits the Court to Strike Immaterial and**
 10 **Impertinent Material**

11 For all of the reasons stated above, this Court should dismiss Plaintiff's claim
 12 pursuant to Rule 12(b)(6). In the alternative, however, the Court should strike select
 13 portions of the Complaint pursuant to Fed. R. Civ. P. 12(f), under which "a court
 14 may strike from a pleading...any redundant, immaterial, impertinent, or scandalous
 15 material." FED. R. CIV. P. 12(f). The purpose of a Rule 12(f) motion "is to avoid the
 16 expenditure of time and money that must arise from litigating spurious issues by
 17 dispensing with those issues prior to trial." *Sidney-Vinstein v. A.H. Robins Co.*,
 18 697 F.2d 880, 885 (9th Cir. 1983). A motion to strike may be granted where the
 19 court is "convinced that there are no questions of fact, that any questions of law are
 20 clear and not in dispute, and that under no set of circumstances could the claim or
 21 defense succeed." *RDF Media Ltd. v. Fox Broad. Co.*, 372 F. Supp. 2d 556, 561
 22 (C.D. Cal. 2005).

23 **2. The Complaint Fails to Meet the Specificity Requirements**
 24 **of Rule 9(b)**

25 Plaintiff purports to have seen and relied upon "advertising" by JBCC
 26 regarding Sport Beans, but she has said nothing as to where, when, or what it said.
 27 Under Rule 9(b), a Complaint must set forth allegations of fraud with enough
 28 specificity to give defendant notice of the particular misconduct. *Bly-Magee v.*

84506232v3

1 *California*, 236 F.3d 1014, 1019 (9th Cir. 2001). Plaintiff must allege facts setting
 2 forth “‘the who, what, when, where and how’ of the misconduct charged.”
 3 *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003); *Swartz v.*
 4 *KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007). Plaintiff has not even made a
 5 pretense at providing these details as to the advertising she allegedly saw.
 6 Therefore, her allegations about advertising should be stricken. (*See, e.g.*,
 7 Complaint, “Introduction,” and ¶¶ 1 (“Prior to purchasing Defendant’s product,
 8 Plaintiff reviewed and relied upon Defendant’s advertising...”),
 9 2 (“Defendant...is the company that created and/or authorized the false, misleading,
 10 and deceptive advertisements...”), 10, 19, 21, 32, 50, 51, 53, 59, and 60.)

11 **3. Plaintiff Lacks Standing to Seek Injunctive Relief**

12 Plaintiff also purports to seek injunctive relief, directing JBCC “to cease and
 13 desist from engaging in the unfair, unlawful and/or fraudulent practices alleged in
 14 the Complaint.” (Complaint, Prayer for Relief, ¶ 4). To maintain standing to seek
 15 injunctive relief, a plaintiff must demonstrate “a real and immediate threat of
 16 repeated injury.” *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir.
 17 2007); *see also Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006). Here,
 18 Ms. Gomez has apparently come to learn that ECJ is sugar, not juice, and therefore
 19 will never be misled about that term in the future.

20 The Ninth Circuit has repeatedly found that a plaintiff lacks standing to seek
 21 injunctive relief in a false advertising case if she is not at risk of being deceived in
 22 the future. *Luman v. Theismann*, 647 F. App’x 804, 807 (9th Cir. 2016) (affirming
 23 dismissal of CLRA and FAL claims because plaintiff did not allege that she would
 24 be injured by the allegedly deceptive advertisement in the future); *Perez v. Nidek*
 25 *Co.*, 711 F.3d 1109, 1114 (9th Cir. 2013) (affirming dismissal of CLRA claim when
 26 there was no allegation that plaintiff intended further use of service at issue).⁷

27 _____
 28 ⁷ *See also Strumlauf v. Starbucks Corp.*, 192 F. Supp. 3d 1025, 1030 (N.D. Cal. 2016) (“Plaintiffs
 84506232v3

Moreover, “a plaintiff may not manufacture standing for injunctive relief simply by expressing an intent to purchase the challenged product in the future.” *Rahman v. Mott’s LLP*, No. 13-cv-3482 SI, 2014 WL 5282106, at *6 (N.D. Cal. Oct. 15, 2014).

Plaintiff fails to allege that she will ever purchase Sport Beans again, and even if she did, she will always know what she now knows about ECJ. She lacks standing, and her allegations about injunctive relief should be stricken.

V. CONCLUSION

Plaintiff’s Complaint has the look and feel of a form document to which Plaintiff has merely loaned her name. If a real person named Jessica Gomez bought Sport Beans because she was truly duped, this Complaint does not tell her story. She has not stated a claim. Defendant respectfully requests that this Court grant its motion.

DATED: April 21, 2017

SEDGWICK LLP

By /s/ Anthony Anscombe
 ANTHONY J. ANSCOMBE
 KAREN WOODWARD
 ALEXANDER A. GUNEY
 Attorneys for Defendant
 JELLY BELLY CANDY COMPANY

allege that they were ‘induced’ to purchase Starbucks lattes by Defendant’s misrepresentations and omissions, and had they known that the lattes were underfilled, they would not have purchased them on the same terms. Now they know. There is no danger that they will be misled in the future.”); *Khasin v. R. C. Bigelow, Inc.*, No. 12-cv-02204 WHO, 2016 WL 1213767, at *5 (N.D. Cal. Mar. 29, 2016) (same); *McMillan v. Lowe’s Home Centers, LLC*, No. 15-cv-00695 DAD, 2016 WL 2346941, at *4 (E.D. Cal. May 4, 2016) (same); *Phillips v. Apple Inc.*, No. 15-cv-04879 LHK, 2016 WL 1579693, at *9 (N.D. Cal. Apr. 19, 2016) (“[P]laintiffs who were induced into purchasing a product through deceptive advertising must allege intent to purchase the deceptively-advertised product in the future in order to have standing to seek injunctive relief.”); *Cover v. Windsor Surry Co.*, No. 14-cv-05262 WHO, 2016 WL 520991, at *12 (N.D. Cal. Feb. 10, 2016) (same); *In re: First Am. Home Buyers Prot. Corp. Class Action Litig.*, 313 F.R.D. 578, 612 (S.D. Cal. 2016) (same); *Makaeff v. Trump Univ., LLC*, 145 F. Supp. 3d 962 (S.D. Cal. 2015) (same); *Duran v. Hampton Creek*, No. 15-cv-05497 LB, 2016 WL 1191685, at *7 (N.D. Cal. Mar. 28, 2016) (“Given the allegations in this complaint, Mr. Duran will not be deceived again and thus does not have standing to pursue injunctive relief in the form of a label change.”).

84506232v3